Filed 8/25/09 Debra B. v. Superior Court CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DEBRA B.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES AGENCY et al.,

Real Parties in Interest.

G042135

(Super. Ct. No. DP017154)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Jane Shade, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition denied.

Juvenile Defenders and Stacey Leaton for Petitioner.

No appearance for Respondent.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Real Party in Interest Orange County Social Services Agency.

No appearance for Real Party in Interest Diana B.

* * *

## INTRODUCTION

Debra B. (mother) is the mother of Diana B., who was taken into protective custody at three years of age. Mother challenges an order of the juvenile court (1) denying her petition, without a hearing, under Welfare and Institutions Code section 388, to change an earlier court order which denied reunification services to mother and removed Diana from her care and custody, and (2) decreasing mother's visitation with Diana, pending a permanency hearing. (All further statutory references are to the Welfare and Institutions Code.) We conclude the juvenile court did not abuse its discretion in making the order. Mother failed to make a prima facie showing of new evidence or changed circumstances, and that the proposed order would be in Diana's best interests; under section 388, the juvenile court properly denied the petition without an evidentiary hearing. The decrease in mother's visitation was well within the court's discretion. We therefore deny mother's petition for a writ of mandate.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

Diana, then three years old, was taken into protective custody by the Orange County Social Services Agency (SSA) in June 2008. Diana and her two minor half siblings[1] were removed from mother's custody after Diana's adult half sibling reported that Luis L., the boyfriend of Diana's maternal grandmother, had sexually

[1] Diana's two minor half siblings are not parties to the current writ petition.

abused him (and another now-adult half sibling) when he was between the ages of three and nine, and threatened to kill him if he reported the abuse. In June 2008, Luis was staying in a motel with Diana, her minor half siblings, mother, and the maternal grandmother. Mother and the maternal grandmother did not believe any sexual abuse of Diana's adult half siblings had occurred.

The motel room in which the family was staying was filthy. The children's school reported the school-age children were frequently unkempt, had extremely poor hygiene, and were chronically late for school.

A juvenile dependency petition was filed on June 13, 2008, alleging Diana came within section 300, subdivisions (b), (d), and (j). The petition, as later amended, alleged (1) mother lived in unsanitary, unhealthy, and unsafe living conditions, despite intervention by SSA and the juvenile court, placing Diana at risk of harm or illness; (2) Diana had been infested with lice, wore dirty and smelly clothes, had poor hygiene, and was unkempt; (3) mother had failed to ensure Diana's minor half siblings regularly attended school or received their prescribed medication for attention deficit disorder; (4) mother's lifestyle lacked stability and consistency; (5) Diana's father failed to protect Diana from mother's neglect, due to his incarceration; (6) mother had allowed Diana to be in contact with Luis, despite (a) mother's knowledge that he had sexually abused Diana's now-adult half siblings, and had threatened to kill them if they disclosed the abuse, and (b) the fact mother herself had been raped by Luis when she was a minor, both of which placed Diana at significant risk of sexual abuse and physical harm; and (7) since 1992, several other half siblings had been dependents in the juvenile court system, and mother had failed to reunify with any of them. Diana was placed in foster care, along with her minor half siblings.

Mother pleaded no contest to the amended petition at a jurisdiction hearing in August 2008. The juvenile court found the allegations of the amended petition true by a preponderance of the evidence. At a disposition hearing in September 2008, the court

declared Diana to be a dependent child, and found vesting custody with SSA was in her best interests. The court also found, pursuant to section 361.5, subdivision (b)(10) and (11), that reunification services need not be provided to mother.[2] Mother did not challenge the juvenile court's dispositional findings.

At the detention hearing in June 2008, mother was granted twice-weekly, two-hour monitored visits with Diana. Mother's visits were never liberalized. Mother was generally appropriate during visits; however, she missed at least five visits without notice. Mother tested positive for oxycodone in December 2008. In February 2009, SSA recommended mother's visits be restricted to one time per week, and remain monitored.

In March 2009, mother submitted a petition pursuant to section 388, asking the juvenile court to return Diana to her care, to implement a plan to gradually return Diana to her care, or to order family reunification services. In a declaration attached to the petition, mother declared the following: (1) she was living in a one-bedroom apartment, and would be eligible to move into a two-bedroom apartment if Diana were returned to her care; (2) mother had completed individual counseling and "made progress in all of [her] therapy goals"; (3) she completed a parenting class through Olive Crest and a parenting program through Orange County Youth and Family Services; (4) mother's

[2] "Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] . . . That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian. [¶] . . . That the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent." (§ 361.5, subd. (b)(10), (11).)

positive drug test in December 2008 was due to pain medication, prescribed by a medical doctor following gynecological surgery; (5) mother's independent living mentor worked with mother to establish independent living skills, and stated mother had shown "great improvement in the areas of health, hygiene, shopping for household necessities, budgeting and being more assertive"; (6) mother's monitored visits were positive; (7) mother had completed her case plan and was willing to complete any additional services; and (8) returning Diana to mother's care would be in Diana's best interest because mother was "now able to show the stability [she had] secured after learning from the various services [she had] completed," and because, although Diana had been out of mother's care and custody since June 2008, mother had been "the most constant thing" in Diana's life. Diana's counsel opposed the petition.

On May 28, 2009, the juvenile court reduced mother's monitored visits with Diana to one time per week, set a permanency hearing for September 2009, and denied mother's section 388 petition. Mother timely filed a notice of intent to file a writ petition.

## DISCUSSION

### I.

### *SECTION 388 PETITION*

Mother contends the juvenile court abused its discretion by summarily denying her section 388 petition. We apply the abuse of discretion standard in our review of the juvenile court's decision to deny the section 388 petition without a hearing. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.) We may not reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 319.) We affirm the order unless it """exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."""

(*In re Brittany K.*, *supra*, 127 Cal.App.4th at p. 1505.) The juvenile court's decision will not be disturbed unless the court "'"has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]."' [Citations.]" (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

"The parent seeking modification [through a section 388 petition] must 'make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]' [Citations.] There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.] If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

The juvenile court concluded mother had failed to satisfy either prong of the prima facie test, and denied the section 388 petition without an evidentiary hearing: "First of all, in a [section] 388 motion the court notes that although the petition should and must be liberally construed in favor of granting a hearing, the court need not put on blinders when determining whether the required showing has been made. The court can consider the entire factual and procedural history of a case when evaluating the significance and strength of the allegations in the [section] 388 petition. [¶] So that's what the court is going to do here when the court considers the two prongs. [¶] First, in terms of the circumstances here, the court notes the attachments that mother has put with her [section] 388 motion to indicate changed circumstances. . . . Mother has attended various classes and programs, but there is not a showing that she has benefitted from those or been able to apply what she is supposed to have learned. And that is the court's concern with the attempt to make the showing here. And the court is concerned about that. The court understands this is not the time to prove anything but at least to make the

record that it's showing. The court finds that that showing is not made here. [¶] Second, there is not a showing that the change would be in the best interest of the children. Reunification services were ordered terminated in September of 2008.[3] The court is not aware of what the reasons were for the prior judge's order to allow considerable funding to go forward for services. However, the court previously made that order. Those funds were ordered. But in any event there is no showing of why any such change would be in the best interest of the children. [¶] So with all that before the court and the court, having heard arguments of counsel, denies the motion at this time."

The attachments to mother's section 388 petition did not show anything had changed. The letter from mother's therapist does not establish she completed therapy, or describe any progress she made in therapy. The letter merely states mother arrived on time for and "actively participated" in her weekly sessions. Mother's personal care assistant (whom mother describes as an independent living mentor) reported mother was "a very good advocate for [herself] in expressing her needs and feelings," and "continues to put forth an effort in trying to obtain her three children by doing whatever the court ask[s] of her." The personal care assistant's letter, however, fails to show mother had changed any of the behaviors that had led to the dependency proceedings for her children. Although mother's need for pain medication following surgery could explain her positive drug test in December 2008, mother failed to provide this explanation until she filed her section 388 petition, and she did not submit to any drug tests after December 2008.

Mother received significant reunification services in other dependency proceedings. She also received other help from SSA and the juvenile court to try to change the behaviors that prevented her from providing adequate care for her children. Because mother failed to change those behaviors, the juvenile court correctly found mother had not made a "reasonable effort to treat the problems that led to removal of"

---

[3] Reunification services were never ordered for mother, pursuant to section 361.5, subdivision (b)(10) and (11).

Diana's half siblings. The court did not err in determining the section 388 petition showed, at most, changing but not changed circumstances.

In determining whether the relief sought by a section 388 petition would be in the best interests of the child, the following factors should be considered: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

Mother concedes the problems leading to dependency were serious. Mother contends that she has resolved those problems, citing her completion of parenting classes and work with a mentor. SSA, however, detailed problems arising at monitored visits which showed mother had either failed to internalize what she had learned, or was unable to put it into practice. Mother's statement that she had been "the most constant thing" in Diana's life is unsupported by anything in the record, and demonstrates mother's inability to truly understand Diana's needs or the responsibilities mother would face if Diana were returned to her care. Notably, nowhere in the section 388 petition does mother address the allegations of sexual abuse against the maternal grandmother's boyfriend. At the time Diana was detained, mother had responded to the sexual abuse allegations and the allegations she had continued to allow the maternal grandmother's boyfriend to have contact with Diana and her half siblings, by stating, "'I thought the case was closed,'" "'I don't know why they keep bringing that up,'" and "'I'm becoming a Christian and letting the past be the past.'" Her failure to display any current understanding of the problems or explain how she would protect Diana from becoming the victim of sexual abuse is telling.

In short, mother failed to show that the services in which she participated could overcome the lengthy history of failing to use previous services to change her behavior to protect and care for her children.

The strength of the relative bonds between the dependent children to both parents and caretakers becomes an even more important factor when a section 388 petition is filed after reunification services have been terminated. In *In re Stephanie M., supra,* 7 Cal.4th 295, 317, the California Supreme Court stated, "[a]fter the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." The same standard must apply when reunification services were never provided.

Here, the section 388 petition did not in any way address the strength of the relative bonds of the children to mother and to the foster parents. Diana had been placed in the home of the foster parents since July 2008, and had flourished there. The social worker reported that Diana had adjusted well to life with her foster parents, referred to them as "'Mom'" and "'Dad,'" and the foster parents had a "high degree of pleasure . . . caring for her." Diana's medical and behavioral problems had resolved.

"At this point in the proceedings, on the eve of the selection and implementation hearing, the children's interest in stability was the court's foremost concern, outweighing any interest mother may have in reunification." (*In re Anthony W., supra,* 87 Cal.App.4th 246, 251-252.) We conclude the juvenile court did not err in denying mother's section 388 petition without an evidentiary hearing.

II.

*VISITATION*

The juvenile court's order reducing mother's visitation with Diana to one time per week is reviewed for abuse of discretion. (*In re Megan B.* (1991) 235 Cal.App.3d 942, 953.)

In the addendum report filed in December 2008, SSA recommended that due to inconsistencies and failures to show up for visits, mother should be ordered to confirm scheduled visits with the foster parents or assigned monitor 24 hours before the visits. The report noted, "[s]hould [mother] fail to do this, or should [she] then no-show for visits, visitation will need to be re-assessed at that time." The court-appointed special advocate volunteer assigned to Diana's case filed a report with the juvenile court, stating, "Diana's foster mother has expressed to me that these visits [with mother] are 'a waste of time' and she doesn't feel the kids are excited about them or get much from them."

Because mother was denied reunification services under section 361.5, subdivision (b)(10) and (11), the juvenile court had discretion to permit or deny visitation. (§ 361.5, subd. (f); *In re J.N.* (2006) 138 Cal.App.4th 450, 458.) The court therefore had the discretion to modify mother's visitation. We note also that the court did not terminate visitation; rather, it reduced visitation to one time per week. The cases mother cites regarding the failure of a court to order any visitation—*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1504 and *In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1407—are inapposite.

The juvenile court did not err in reducing (as opposed to terminating) mother's visits with Diana. The permanency hearing had been set, mother's section 388 petition had been denied without a hearing, and over the 11 months of Diana's dependency, mother had failed to demonstrate any improvement that would have permitted the liberalization of the visits she had been granted. The decrease in visitation with mother was not detrimental to Diana at this stage of the dependency proceedings.

## DISPOSITION

The petition is denied.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.